

7 Official Opinions of the Compliance Board 216 (2011)

Closed Session Procedures – Written Statement Generally –
Written statement to be completed by presiding officer or
ratified by presiding officer’s signature prior to closed session.
– Written statement may, but need not, reflect identities of
members voting to close. – Written statement must be
informative

Exceptions Permitting Closed Sessions – Personnel, §10-508(a)(1)
– Within Exception – Discussion of individuals.

Administrative Function
– Discussion of members’ own committee assignments, within
administrative function
– Discussion of reorganization of departments, outside the
administration function

Exceptions Permitting Closed Session – Property Acquisition, §10-
508(a)(3) – Discussion of sale of public body’s property, outside
exception

June 27, 2011

Complainant:
Craig O’Donnell

Respondent:
Queen Anne’s County Commissioners

We have considered the complaint of Mr. Craig O’Donnell (“Complainant”) that the County Commissioners of Queen Anne’s County (“Commissioners”) violated the Open Meetings Act (“the Act”) with respect to certain meetings of the current Commissioners in early 2011 and of the former Commissioners in 2009 and 2010. We have also considered the Commissioners’ response admitting some alleged violations and denying others.

We shall set forth the facts and our conclusions in our discussion.

I

Discussion

A. Allegations concerning the adequacy of closing statements in 2011

Complainant alleges that the closing statements for meetings held on December 28, 2010, January 4, 11, and 25, 2011, February 22, 2011, and March 1, 2011 are variously deficient because (1) the signature of the presiding officer appears to have been stamped; (2) only a citation to the relevant statutory exception is given as the “reason” for the closed session; (3) the statements do not identify the commissioners who made and seconded the motion to close; (4) the cited exceptions did not apply to the discussion; (5) the closing statements do not contain the amount of detail required by the Act; and (6) the Commissioners impermissibly discussed contract matters. These allegations mostly require us to apply §10-508 of the State Government Article (“SG”), which sets forth the reasons for which a public body may close a meeting involving a function covered by the Act and the procedures for doing so.

1. The use of a signature stamp. The Commissioners state that “County staff has on occasion, utilized a stamp signature of the President of the County Commissioners on the closing statement.” Noting that the Act does not prohibit that practice, they nonetheless state that future closing statements will bear an original signature.

The Act does not require the presiding officer to sign the closing statement. It does, however, require that officer to “conduct a recorded vote on the closing of the session” and “make a written statement of the reason for closing the meeting, including a citation of the authority [under SG§10-508], and a listing of the topics to be discussed.” SG §10-508. As we have noted, the closing statement is an “accountability tool,” 4 *OMCB Opinions* 188, 196 (2005), and the Act requires the presiding officer, and the presiding officer alone, to complete it. The most efficient way for a public body to establish compliance with that requirement, (and to avoid creating suspicion), is for the presiding officer to sign the statement when generating it, and we commend the Commissioners’ undertaking to follow that practice. We discuss other aspects of the presiding officer’s responsibility in Section B.

2. The sufficiency of the statement of the “reason for closing the meeting.” Complainant alleges that the closing statements violate the Act because the “reason for closing the meeting” is simply given in the form of a citation to the statutory exception invoked as a basis for the closing. The Commissioners respond that they used the form statement recommended by us,

that they provided more detail under the heading “Topics to be discussed,” and that they will in any event provide more detail in the future.

SG §10-508(d)(2)(ii) requires the presiding officer to make a written statement before the public body meets in closed session, of “the reason for closing the meeting, including a citation of the authority under [SG §10-508], and a listing of the topics to be discussed.” We have found that a closing statement which contained no “reason for closing” substantially complied with SG §10-508(d)(2)(ii) because “the reasoning was implicit in the information disclosed” elsewhere on the form. 4 *OMCB Opinions* 188, 195 (2005).

The Commissioners’ various topics statements, as quoted by Complainant, read with the statutory reference, convey the subjects discussed in the various closed sessions in enough detail for the Complainant to question whether the discussion actually fell within the claimed exception. For instance, when claiming the exception provided by §10-508(a)(3) for the discussion in a closed session of matters pertaining to the acquisition of property, the Commissioners identified the property. Nonetheless, to comply fully with the Act, the closing statement should state the reason the public body voted to close the meeting, and we commend the Commissioners’ undertaking that their presiding officer will follow this practice in the future.

3. The failure of the closing statements to identify the commissioners who made and seconded the motion to close. While SG §10-508 (d)(2) requires the presiding officer to “conduct a recorded vote on the closing of the session,” it does not require the officer to record on the closing statement the identities of the people who made and seconded the motion to close. We do not find any violation of the Act in this regard.

4. The applicability of the cited exceptions to the discussions held. SG §10-508 permits a public body to close a session for any of 14 specific exceptions to the general requirement that public business within the scope of the Act be conducted in the open. Complainant alleges that six meetings were closed to discuss matters not within the exception claimed on the closing statement. We take them in chronological order.

December 28, 2010 meeting. The Commissioners met in closed session to discuss “Boards, Commissions, addendum to employee contract.” They cited SG §10-508(a)(1) (“the personnel exception”), which permits a public body to meet in closed session to discuss:

- (i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or

- (ii) any other personnel matter that affects 1 or more specific individuals [.]

The minutes of the open session additionally cite SG §10-503(c) and state that the Commissioners “went into closed session for the purpose of conducting an administrative function meeting.” SG §10-503(a) provides that the Act does not apply generally to a public body meeting to carry out an administrative function except as provided in subsections (b), which is not relevant here, and (c). Subsection (c) provides that a public body which closed a public meeting to carry out an administrative function must include certain information, notably “a phrase or sentence identifying the subject matter discussed,” in the minutes for the next public meeting. The Commissioners’ open-session minutes state: “The Board discussed an addendum to an employment contract and what Boards and Commissions they would serve on.”

Complainant alleges that the “Boards and Commissions” discussions involved the Commissioners’ own assignments, that the summary and closing statements contradict each other, and that “if [the Commissioners] are going to use 10-503 as a cover for a private debate over [assignments], they cannot tell the public they are closing under 10-508(a)(1) to discuss “boards and committees.” He further alleges that the employment matter had to do with the shifting positions of “two particular employees,” that the reassignment of them was not confidential and should not have been confidential in light of the prominence of the positions, and that the minutes were insufficient because more information appeared in news accounts.

We begin with the “commissions and boards” discussion. The personnel exception stated by SG §10-508(a)(1)(i) includes the discussion of the “appointment” or “assignment” of “appointees” or “officials” over which the public body has jurisdiction and so encompasses a public body’s assignment of its own members to boards and commissions. However, a public body conducts an administrative function when it discusses its own organization, and SG §10-508 does not apply. *7 OMCB Opinions* 142 (2011). We do not fault the Commissioners for unnecessarily disclosing on a closing statement the topic of their administrative discussion.

SG §10-503 does apply when the public body has closed a public meeting to conduct an administrative function, but the Commissioners complied with that provision by amply disclosing the assignments they made during their closed session.

The discussion of addenda to the contracts of two particular employees also falls within the SG §10-508(a)(1)(ii) exception for “any other personnel matter that affects 1 or more specific individuals.” That exception, like the other

exceptions, does not evaporate when the matter discussed would be of particular interest to the public. The allegation that the Commissioners discussed two individuals in prominent positions thus does not state a violation of the Act. Nor were the Commissioners required to identify the person or persons discussed. *See 6 OMCB Opinions* 127, 136 (2009). We do not find violations with respect to the December 28, 2010 closing statement.

January 4, 2011 meeting. The Commissioners closed a meeting under the personnel exception to discuss an “addendum to an employee’s contract and a new employee contract.” Complainant alleges that the minutes of the next public meeting did not contain any information on what occurred at the closed session. The Commissioners acknowledge that SG §10-509(c) required them to make certain disclosures. They admit that they omitted those disclosures from the minutes of the next meeting. They further identify the individuals and contracts discussed, confirm that only those personnel matters were discussed, and state that they are “committed to correcting any and all deficiencies noted.” We trust that this information will be available to other citizens reviewing the January 4, 2011 minutes. Because the Commissioners have admitted this violation, we need not discuss it further.

January 11, 2011 meetings. The Commissioners met in three non-public sessions. They held the first session before convening publicly to discuss administrative matters regarding board and commission appointments. Although the Act did not apply to that meeting, they later included the topic on a closing statement completed during the open session they held later that morning. They also disclosed in the minutes of the open session that they had “reviewed various board appointments.” Although the Commissioners’ use of a SG §10-508 closing statement for a separately-held administrative function meeting could indeed cause confusion, we again do not fault the Commissioners for disclosing more information than required.

The January 11, 2011 closing statement also reflected the closing of the public meeting under the personnel exception to discuss “the appointment of a new finance director and administrator.” As fully disclosed in the minutes of the open session, that discussion occurred at the third session of the day. The appointment of the two employees in question fell within the personnel exception. The administration of an oath to the new County Administrator was an administrative task, and the Commissioners complied with SG §10-503(c) by disclosing it in the minutes. We do not find any violations of the Act with respect to these two closed sessions.

The second closed session on January 11, 2011 is more problematic. The minutes of the open session state that the Commissioners discussed the “elimination of a position” and voted to approve that the “Sheriff’s department ... fill three vacant positions.” With respect to the first topic, the

Commissioners inform us that they discussed whether to eliminate the position of chief operating officer, soon to be vacated by the appointment of that employee as County Administrator. The extent to which this discussion involved his performance or that of other employees or prospective employees is unclear. The “elimination of a position,” while it is vacant, likely involves the setting of policy, rather than the discussion of information specific to a particular individual. Even where the discussion involves a position held by so few employees that everyone knows whose positions are being discussed, the discussion must be held in an open meeting unless it involves the performance or other attributes of those individual employees. 3 *OMCB Opinions* 335, 337 (2003). The exception thus does not apply where anyone in the position would be affected by the action being considered. *Id.*

The second topic, the action on permitting the Sheriff’s Department to fill three vacancies, appears to implicate budget matters, as it is unclear at best whether the vacancies in question would be filled by employees over whom the Commissioners “have jurisdiction” under the exception. The open minutes also do not report a discussion of specific individuals in this regard. We again refer the Commissioners to the principles set forth in 3 *OMCB Opinions* 335, *supra*.

January 25, 2011 meeting. The Board met initially in a closed session. The minutes of the subsequent open session disclose that they met “for the purpose of conducting an administrative function meeting; Pursuant to [SG] §10-508(a)(1)” The minutes state that they discussed “board appointments and reorganization.” As explained above, the Commissioners could have held a closed session to discuss board appointments without completing a closing statement. However, the “reorganization” discussion by its terms appears to involve a policy question not qualifying as an “administrative function.” Also as explained above, the personnel exception does not extend to a discussion about the elimination of positions without regard to the performance or attributes of specific employees. The Commissioners have provided us with the minutes of that closed session and have explained that their discussion about reorganizing a particular part of the County government in fact involved a discussion of specific individuals. The Commissioners thus did not discuss matters outside of the scope of the exception. They did violate the Act by providing insufficient detail in the summary in the open-session minutes.

February 22, 2011 meetings. The Commissioners met in two closed sessions. They closed the first under SG §10-508(a)(3), which is the exception “to consider the acquisition of real property for a public purpose and matters directly related thereto,” and disclosed in their open-session minutes that they had “discussed the Matapeake Business Park site.” Complainant alleges, and the Commissioners do not dispute, that the County owns the business park and that the Commissioners could not have been discussing an acquisition of the

site. SG §10-508(a)(3) applies to the acquisition of real property, not the transfer of real property, 6 *OMCB Opinions* 35, 39 (2008), and the Commissioners therefore violated the Act by discussing County property in a meeting closed under this exception. The exception in SG §10-508 (a)(7) for consulting with counsel to obtain legal advice would have applied, had the Commissioners cited it: the open-session minutes disclose his presence, and the closed-session meetings demonstrate the applicability of that exception.

The Commissioners held a second closed meeting under SG §10-508(a)(3), which is the exception to “consult with counsel to obtain legal advice,” and disclosed in their open-session minutes that they had “discussed the Board of Education budget.” The minutes also disclose that the County Attorney attended the session. The information provided to us demonstrates that the closed-session discussion fell within the scope of the exception. We encourage the Commissioners to refer to a discussion or consultation “with counsel” to avoid future complaints that a meeting was improperly closed under this exception.

March 1, 2011 meeting. The Commissioners invoked the personnel exception to close a session which involved the elimination of positions. They listed “Reorganization Proposal” as the topic to be discussed. As discussed above, that policy issue would not fall within the exception. However, the Commissioners state in their response that the actual discussion concerned “specific discussions ... on the particular individuals” who held the positions being eliminated. We find that the exception applied, but that the closing statement was inadequate.

In summary, most of the problems noted above arose from the Commissioners’ inadequate disclosures of the bases of, and actions taken during, their closed session, not from the discussion in closed session of topics exceeding the scope of any exception. This complaint is a textbook example of how an unnecessarily-vague description of the topic of a closed session can lead the public to conclude that the public body has met secretly to discuss a topic required to be discussed in the open. We reiterate that a public body should disclose on the closing statement as much information as it can without revealing the information that the Act permits the public body to keep confidential. We encourage the Commissioners to look on the Act as providing mechanisms which, when used properly, can serve to protect them against unwarranted suspicions. Here, for instance, had the references to “reorganization” in meetings closed under the personnel exception instead specified “personnel issues pertaining to specific individuals whose positions may be affected by the proposed reorganization,” Complainant would have had no basis for alleging that the description was too vague and that the topic exceeded the scope of the exception.

B. Allegations concerning violations by the former Commissioners

Complainant alleges violations with regard to ten meetings held by the prior Board of County Commissioners (“prior Board”). Complainant alleges that the prior Board conducted closed sessions for the purpose of discussing the acquisition of real property and consulting with legal counsel and discussed topics outside of those exceptions, and that their open-session minutes lacked sufficient detail about the actions taken in the closed sessions. None of these allegations involves the current Commissioners. We shall forego an extensive discussion of each meeting in the belief that our prospective advice on these topics will be more productive for all parties.

All ten meetings were closed under SG §10-508(a)(3), pertaining to the “acquisition of real property.” Complainant alleges that the references in the open-session minutes were insufficiently detailed because they contained sentences such as “The Board discussed purchasing parcels of property,” or “The Board discussed property in Centreville,” or “The Board discussed several parcels of land,” or “discussed the Matapeake site development,” or “discussed the Rural Legacy program and the Courthouse Property.” One closing statement merely cited the statute. Complainant states that the public was surprised to learn later that the Commissioners had purchased property from a local judge and that one contract was suddenly voted on in an open session. One meeting involved a discussion of “an upcoming court date,” in a session closed under SG §10-508(a)(7), which is the exception for consulting with counsel to obtain legal advice.

SG §10-508(d) requires the presiding officer to make a written statement listing the reason for closing the meeting, a citation of the authorities, and a list of the topics to be discussed. The new Commissioners assured us in their response to the allegations pertaining to their meetings that they will provide that information on future closing statements.

The information on future closing statements should at a minimum establish the applicability of the exception. For instance, “discussed several parcels” does not necessarily mean that the Commissioners discussed acquiring those parcels, and discussions about the Matapeake site development and the Rural Legacy Program do not appear to pertain to the acquisition of property at all. Similarly, the sentence, “The board discussed an upcoming court date” does not establish that the Commissioners sought any legal advice. Also at a minimum, the Commissioners should disclose as much information as they can without compromising the confidentiality of matters discussed within the claimed exception. As we stated in 1 *OMCB Opinions* 16, 17 (1992),

The level of detail in the written statement required prior to a closed session and in the minutes of the ensuing open session may preserve the confidence of information that led to the session's being closed in the first place.

Put another way, the public body may not withhold information unnecessarily. Although we have often stated that mere boilerplate repetition of the language of the Act is insufficient, there is no hard and fast rule for how much information is required in every circumstance. For instance, in some land acquisition matters, it may be appropriate to withhold all identifying information from the public eye until an agreement has been reached. Although the identity of certain land under consideration, or of its seller, might be of great public interest, the Act does not require the public body to disclose it.

We stress that the decision of what information should be disclosed on a closing statement requires a good-faith judgment call by the presiding officer, who is responsible for preparing it. SG §10-508(d). All of the members of the public body are responsible for keeping the discussion within the reason stated in the motion to close the session. SG §10-508(b). For instance, when a closed-session discussion about a particular purchase of land or proposal of a business to locate in the County strays into broader policy, as when the purchase or proposal calls for the Commissioners to adopt generally-applicable land-use policies, *see, e.g., 7 OMCB Opinions* 148 (2011), that discussion very likely has exceeded the scope of those exceptions and should be conducted openly. Under the Act, the responsibility for complying with the SG §10-508 closing procedures lies with the members of a public body, not its staff.

Finally, the members who vote to adopt open-session minutes containing a summary of a prior closed session in effect certify the sufficiency of that summary; "it is through the approval of minutes that a public body can be said to accept responsibility for the record of its meetings." *5 OMCB Opinions* 105, 112 (2007). The Act thus also makes compliance with the SG §10-509 minutes procedures the responsibility ultimately of the members of the public body, not of its staff.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio A. Morales, Esquire